

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOSEPH MARTINEZ,
Plaintiff,

v.

SPOKANE COUNTY, et al.,
Defendants.

No. CV-07-409-FVS

ORDER GRANTING
AND DENYING SUMMARY
JUDGMENT

THIS MATTER comes before the Court without oral argument based upon the defendants' motion for summary judgment and their motion to strike an affidavit. They are represented by James H. Kaufman. The plaintiff is represented by Douglas D. Phelps.

BACKGROUND

Joseph and Mary Martinez live in Spokane County, Washington. Their marriage has been marred by domestic violence. On more than one occasion, Mrs. Martinez has obtained an order from a State of Washington court prohibiting her husband from contacting her. Deputy Robert King is employed by the Spokane County Sheriffs Office. He is familiar with the Martinezes and their troubled marriage. At some point prior to December 23, 2005, he arrested Mr. Martinez. The latter possessed a knife at the time of his arrest.

On December 23, 2005, Deputy King learned a warrant existed for Mr. Martinez's arrest. The warrant had been issued by a judicial

1 officer based upon probable cause to believe Mr. Martinez had
2 committed two offenses: one offense was to violate the terms of a
3 "protection order"; the other was to possess a dangerous weapon.
4 Deputy King confirmed the validity of the warrant. Afterward, he and
5 Deputy Robert Stevens drove to the Martinezes' residence. The
6 deputies saw a man inside the house. They submit they recognized him
7 as Mr. Martinez.

8 Mrs. Martinez opened the door. The deputies explained they were
9 there to arrest her husband. Mrs. Martinez called to him, but he did
10 not respond. Mrs. Martinez told the deputies he was upstairs taking a
11 shower. The deputies were still outside the front door. Deputy King
12 shouted to Mr. Martinez he had a warrant for his arrest. Mr. Martinez
13 refused to come downstairs, and began arguing with Deputy King about
14 the validity of the warrant. The deputies waited a short time at the
15 front door; then they entered the house, went upstairs, and located
16 Mr. Martinez. The deputies allege he would not submit to arrest until
17 Deputy King pointed his taser at him. Only then, say the deputies,
18 did Mr. Martinez produce his hands for handcuffing. However,
19 according to the deputies, Mr. Martinez started to walk away when
20 Deputy King began to apply the handcuffs. Deputy King says he did not
21 know where Mr. Martinez was going or what his intentions were. He
22 says he became concerned Mr. Martinez might arm himself or barricade
23 himself in another room. In order to forestall such contingencies,
24 says Deputy King, he shot Mr. Martinez with his taser. Mr. Martinez's
25 account of the incident differs in one crucial respect. Although he
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1 admits arguing with the deputies about the warrant's validity, he
2 insists he surrendered peacefully and raised his arms above his head.
3 He alleges Deputy King fired his taser after he had raised his arms
4 and surrendered.

5 The deputies handcuffed Mr. Martinez and drove him to jail.
6 Deputy King acknowledges Mr. Martinez was very angry. According to
7 Deputy King, Mr. Martinez said he was "a racist" and he "had it out
8 for him." (Affidavit of Robert King at 5.) However, by the time they
9 reached the jail, says Deputy King, Mr. Martinez had calmed down.
10 Indeed, as Deputy King recalls, Mr. Martinez apologized for "giving me
11 a hard time." *Id.* at 6. Mr. Martinez's account differs. He says
12 Deputy King "continued to physically batter me using his hands to
13 strike and/or bind me." (Affidavit of Joseph Martinez at 2.)

14 On December 26, 2007, Mr. Martinez filed a seven-count complaint
15 in federal court against Spokane County, the Spokane County Sheriff,
16 and Deputy King. He seeks damages under 42 U.S.C. § 1983 and the law
17 of the State of Washington. The Court has original jurisdiction over
18 his federal claims. 28 U.S.C. §§ 1331 and 1343. The Court may
19 exercise supplemental jurisdiction over his state claims. 28 U.S.C. §
20 1367. The defendants move for summary judgment. Fed.R.Civ.P. 56.

21 **THE WAHL AFFIDAVIT**

22 Mr. Martinez opposes the defendants' summary judgment motion. He
23 has submitted an affidavit from a man named John Wahl, who is one his
24 neighbors. Mr. Wahl says he spoke with Deputy Robert King
25 approximately eight and one-half months before the incident that gives
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1 rise to this action. According to Mr. Wahl, Deputy Robert King made
2 racist statements about Mexicans. The defendants move to strike the
3 Wahl affidavit on four grounds: In their opinion, the affidavit is
4 not authenticated. Fed.R.Evid. 901(a). The statements Mr. Wahl
5 attributes to Deputy King are hearsay. Fed.R.Evid. 801. The
6 statements are irrelevant, Fed.R.Evid. 401, and their probative value
7 is substantially outweighed by the danger of unfair prejudice.
8 Fed.R.Evid. 403. Mr. Martinez has not responded to the defendants'
9 motion to strike the Wahl affidavit. His failure to respond
10 constitutes consent to the relief requested. Local Rule 7.1(h)(5).
11 The defendants' motion to strike the Wahl affidavit is granted.

12 **ENTRY/SEIZURE**

13 The defendants have submitted a copy of the warrant the deputies
14 relied upon to arrest Mr. Martinez on December 23, 2005. The warrant
15 appears to be valid, and Mr. Martinez has offered no evidence to the
16 contrary. Thus, a rational jury would be compelled to find the
17 deputies possessed a valid warrant for the arrest of Mr. Martinez when
18 they drove to his residence. The deputies allege they saw Mr.
19 Martinez, whom they say they recognized, inside the house as they
20 approached the front door. Mr. Martinez has offered no evidence
21 contradicting the deputies' testimony. Consequently, a rational jury
22 would be compelled to find they knew he was inside the house when Mrs.
23 Martinez opened the door. Under the Fourth Amendment, "an arrest
24 warrant founded on probable cause implicitly carries within it the
25 limited authority to enter a dwelling in which the suspect lives when
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1 there is reason to believe the suspect is within." *United States v.*
2 *Gooch*, 506 F.3d 1156, 1158 (9th Cir.2007) (internal punctuation and
3 citation omitted), *cert. denied*, --- U.S. ----, 128 S.Ct. 1922, 170
4 L.Ed.782 (2008). A misdemeanor warrant is no less authoritative than
5 a felony warrant. *Id.* at 1159. Since the deputies were armed with a
6 valid arrest warrant, and since they knew Mr. Martinez was inside his
7 house, they did not violate the Fourth Amendment by entering his house
8 and arresting him. His unlawful entry and unlawful arrest claims are
9 dismissed.

10 **USE OF FORCE**

11 "[A]ll claims that law enforcement officers have used excessive
12 force -- deadly or not -- in the course of an arrest, investigatory
13 stop, or other 'seizure' . . . should be analyzed under the Fourth
14 Amendment and its 'reasonableness' standard[.]" *Graham v. Connor*, 490
15 U.S. 386, 395, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989) (emphasis
16 in original). Whether a law enforcement officer's use of force was
17 "'objectively reasonable'" depends upon the totality of the facts and
18 circumstances confronting him. *Smith v. City of Hemet*, 394 F.3d 689,
19 701 (9th Cir.) (*en banc*) (quoting *Graham*, 490 U.S. at 397, 109 S.Ct.
20 at 1872), *cert. denied*, 545 U.S. 1128, 125 S.Ct. 2938, 162 L.Ed.2d 866
21 (2005). Mr. Martinez alleges he surrendered and raised his hands
22 above his head before Deputy King fired his taser. The deputies
23 dispute Mr. Martinez's account of the incident. Nevertheless, if a
24 rational jury credits his account (and it could), the jury could find
25 Deputy King acted in an objectively unreasonable manner by using his
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1 taser to subdue a person who was not resisting arrest. See *Brown v.*
2 *City of Golden Valley*, 574 F.3d 491, 496-98 (8th Cir.2009); *Parker v.*
3 *Gerrish*, 547 F.3d 1, 9-11 (1st Cir.2008); *Casey v. City of Federal*
4 *Heights*, 509 F.3d 1278, 1282-83 (10th Cir.2007). In sum, a genuine
5 issue of material fact exists with respect to whether Deputy King
6 violated the Fourth Amendment by shooting Mr. Martinez with his taser.

7 The fact Deputy King may have violated the Constitution does not
8 mean he can be held liable for damages under 42 U.S.C. § 1983. He is
9 entitled to qualified immunity unless his use of a taser on December
10 23, 2005, violated clearly established law. See *Saucier v. Katz*, 533
11 U.S. 194, 202, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001) ("The
12 relevant, dispositive inquiry in determining whether a right is
13 clearly established is whether it would be clear to a reasonable
14 officer that his conduct was unlawful in the situation he
15 confronted."). Deputy King has not addressed this issue. See
16 *Brosseau v. Haugen*, 543 U.S. 194, 199-201, 125 S.Ct. 596, 599-600, 160
17 L.Ed.2d 583 (2004) (*per curiam*) (demonstrating how to determine
18 whether conduct violated clearly established law). Accordingly, he is
19 not entitled to qualified immunity with respect to his use of his
20 taser.
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22 There is a second part to Mr. Martinez's excessive force claim.
23 He alleges Deputy King assaulted him after they arrived at the jail.
24 Deputy King has submitted an affidavit describing his actions and
25 denying any wrongdoing. The evidence presented by Deputy King is
26 sufficient to carry his burden of production under Rule 56. See

1 *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Companies, Inc.*, 210 F.3d
2 1099, 1105 (9th Cir.2000). Accordingly, Mr. Martinez must produce
3 evidence from which a rational jury could find for him on this part of
4 his excessive force claim. See *id.* The only evidence he has
5 presented is the following statement, "Deputy King continued to
6 physically batter me using his hands to strike and/or bind me."
7 (Martinez affidavit at 2.) Based upon this lone statement, a rational
8 jury would be unable to determine what Deputy King did to Mr. Martinez
9 at the jail, much less that Deputy King behaved in an objectively
10 unreasonable manner under the circumstances. As a result, this part
11 of Mr. Martinez's excessive force claim fails. See *FTC v. Stefanchik*,
12 559 F.3d 924, 929 (9th Cir.2009) ("A non-movant's bald assertions or a
13 mere scintilla of evidence are both insufficient to withstand summary
14 judgment."). Deputy King is entitled to summary judgment with respect
15 to Mr. Martinez' allegation he assaulted him at the jail.
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17 **"DUE PROCESS"**

18 Mr. Martinez seems to be alleging Deputy King's initial decision
19 to arrest him and his subsequent decision to shoot him with his taser
20 were motivated by racial animus toward persons of Mexican descent.
21 Mr. Martinez claims Deputy King's conduct deprived him of liberty
22 without due process of law in violation of the Fifth and Fourteenth
23 Amendments. Mr. Martinez's due process claim faces two obstacles.
24 First, while the Constitution prohibits a state law enforcement
25 officer from either arresting a person or employing force against him
26 based upon his race, an arrestee must seek redress under the Equal

1 Protection Clause of the Fourteenth Amendment, not the Due Process
2 Clauses of the Fifth and Fourteenth Amendments. *Cf. Whren v. United*
3 *States*, 517 U.S. 806, 813, 116 S.Ct. 1769, 1774, 135 L.Ed.2d 89 (1996)
4 (discussing a selective enforcement claim).¹ Second, even if the
5 Court were to allow Mr. Martinez to amend his complaint to allege a
6 violation of the Fourteenth Amendment's Equal Protection Clause, he
7 must, at a minimum, prove Deputy King's decisions were motivated by
8 racial animus. *Bingham v. City of Manhattan Beach*, 341 F.3d 939, 948-
9 49 (9th Cir.2003) (in order to avoid summary judgment on an equal
10 protection claim, an arrestee "must produce evidence sufficient to
11 permit a reasonable trier of fact to find by a preponderance of the
12 evidence that the decision was racially motivated" (internal
13 punctuation and citation omitted)).² Without the Wahl affidavit,
14 there is no evidence of racial animus whatsoever. Deputy King is
15 entitled to summary judgment on Mr. Martinez's "due process" claim.
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18 ¹Were Deputy King a federal law enforcement officer, Mr.
19 Martinez arguably could bring an action pursuant to *Bivens v. Six*
20 *Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29
21 L.Ed.2d 619 (1971), alleging a violation of the equal protection
22 component of the Due Process Clause of the Fifth Amendment. See
23 *Ashcroft v. Iqbal*, 556 U.S. ----, ----, 129 S.Ct. 1937, 1948, 173
L.Ed.2d 868 (2009) (citing *Davis v. Passman*, 442 U.S. 228, 99
S.Ct. 2264, 60 L.Ed.2d 846 (1979)).

24 ²It may be necessary for a person in Mr. Martinez's position
25 to prove both a discriminatory motive (racial animus) and a
26 discriminatory effect (similarly situated persons were not
arrested). See *Marshall v. Columbia Lea Reg'l Hosp.*, 345 F.3d
1157, 1168 (10th Cir.2003).

1 The result would be the same even if the Court denied the
2 defendants' motion to strike the Wahl affidavit. Typically, when a
3 jury issue exists in an equal protection case, it is because the
4 arresting officer says or does something at the time of the seizure
5 from which a rational jury could infer discriminatory motive. For
6 example, in *Marshall v. Columbia Lea Reg'l Hosp.*, 345 F.3d 1157, 1166
7 (10th Cir.2003), Jimmie Marshall alleged he was stopped by a police
8 officer on account of his race. The district court granted summary
9 judgment. The Tenth Circuit reversed:

10 The record . . . contains evidence . . . that Mr. Marshall
11 did not commit the traffic violation for which he was
12 initially stopped, that Officer Porter ascertained Mr.
13 Marshall's race before initiating the stop, that he made
14 repeated accusations that Mr. Marshall was on crack with no
15 apparent basis, that he made an apparently unnecessary note
16 of Marshall's race, and that his account of the events
17 changed dramatically between the date of the incident and
18 the date of his affidavit. Other than to insist that Mr.
19 Marshall committed the traffic violation and thus that there
20 was probable cause for the stop and the arrest, the
21 Defendants offer no nondiscriminatory explanation for these
22 aspects of Officer Porter's conduct in this case.

23 345 F.3d at 1170. Here, unlike the police officer described above,
24 Deputy King neither did nor said anything on December 23rd indicating
25 he was motivated by racial animus. To begin with, he did not make any
26 derogatory comments to Mr. Martinez. *Cf. Usher v. City of Los*
Angeles, 828 F.2d 556, 562 (9th Cir.1987) (police officers allegedly
called the plaintiff "nigger" and "coon"). Nor did the deputies
arrest Mr. Martinez based upon their own initiative. Rather, they
went to his house to execute an arrest warrant that had been issued by

1 a judicial officer; a warrant she had issued based upon probable cause
2 to believe he had both failed to comply with a court order and
3 possessed a dangerous weapon. Both offenses are serious matters;
4 especially against a backdrop of domestic violence. Thus, the
5 deputies had an objectively valid reason for contacting Mr. Martinez.
6 Finally, there is largely undisputed evidence Mr. Martinez would not
7 comply with the deputies' instructions until Deputy King threatened to
8 shoot him with his taser. Mr. Martinez acknowledges he refused to
9 come to the front door when the deputies informed him they had a
10 warrant for his arrest. Instead, as he admits, he remained upstairs
11 and argued with them; forcing them to enter his house in order to
12 apprehend him. The fact he reluctantly submitted to arrest tends to
13 support their contention Deputy King had to threaten him with his
14 taser in order to obtain his cooperation. Mr. Martinez appears to
15 concede the point. Why else does he say he raised his arms above his
16 head unless he was facing Deputy King's taser? Whether he actually
17 submitted to arrest thereafter and whether Deputy King ultimately was
18 justified in shooting him are separate factual issues; ones the jury
19 will have to resolve. Nevertheless, the deputies have a
20 nondiscriminatory explanation for each step they took during the
21 course of the arrest, and their explanations are supported by
22 substantial evidence. By contrast, the only potential evidence of
23 discriminatory motive is Mr. Wahl's account of his conversation with
24 Deputy King. Accusations such as Mr. Wahl's are easy to make; very
25 difficult to rebut unless a third person overhears the conversation.
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1 Even if one accepts Mr. Wahl's account at face value, there is no
2 evidence of other discriminatory statements or behavior on Deputy
3 King's part. At most, then, his alleged statements are isolated
4 statements. Furthermore, over eight months elapsed between his
5 alleged statements and the incident giving rise to this action. In
6 view of the preceding circumstances, Mr. Wahl's affidavit is
7 insufficient to create a jury issue with respect to discriminatory
8 motive even if the Court were to deny the defendants' motion to strike
9 it.

10 **SPOKANE COUNTY/SPOKANE COUNTY SHERIFF**

11 Broadly speaking, there are two ways Mr. Martinez may recover
12 damages from Spokane County under § 1983. On the one hand, he can
13 prove the County violated his right to be free from excessive force by
14 adopting a policy, or adhering to a custom, that caused the alleged
15 constitutional violation. See, e.g., *Monell v. Department of Social*
16 *Services*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037-38, 56 L.Ed.2d 611
17 (1978). On the other hand, he can prove the County was deliberately
18 indifferent to an obvious risk he would be subjected to excessive
19 force by its deputies; an indifference that fairly may be
20 characterized as a policy on the County's part. See, e.g., *City of*
21 *Canton v. Harris*, 489 U.S. 378, 391, 109 S.Ct. 1197, 1206, 103 L.Ed.2d
22 412 (1989) (hereinafter "*Canton*"). Mr. Martinez has not discussed
23 either path to liability. Instead, he has contented himself to say,
24 "[I]t would appear based on the discovery submitted by the defendant
25 that the Spokane County Sheriff's Officer was aware, via prior
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1 incidents, of Deputy King's tendency toward violence." (Plaintiff's
2 Response at 3.) Despite making this assertion, Mr. Martinez has not
3 presented any evidence indicating a tendency toward violence on Deputy
4 King's part. Nor, for that matter, has Mr. Martinez presented any
5 evidence indicating Deputy King's superiors were aware of his alleged
6 tendency. All the Court has before it is a conclusory allegation, and
7 a conclusory allegation is not enough to avoid summary judgment. See
8 *Hernandez v. Spacelabs Med. Inc.*, 343 F.3d 1107, 1112 (9th Cir.2003).
9 Spokane County is entitled to summary judgment; so is Spokane County
10 Sheriff Ozzie Knezovich. As he points out, he was not the Sheriff of
11 Spokane County on December 23, 2005.

12 **ASSAULT/BATTERY/FALSE ARREST/FALSE IMPRISONMENT**

13 Mr. Martinez seeks damages under the law of the State of
14 Washington for the torts of assault, battery, false arrest, and false
15 imprisonment. He knew the factual predicate for each cause of action
16 on December 23, 2005. Thus, each cause of action accrued on that
17 date. See *Beard v. King County*, 76 Wn. App. 863, 867, 889 P.2d 501
18 (1995) ("The discovery rule provides that a cause of action does not
19 accrue until an injured party knows, or in the exercise of due
20 diligence should have discovered, the factual bases of the cause of
21 action."). The statute of limitations for each of the torts listed
22 above is two years. RCW 4.16.100(1). Mr. Martinez did not file the
23 instant action until December 26, 2007. By then, the statute of
24 limitations had expired. Consequently, his tort claims for assault,
25 battery, false arrest, and false imprisonment are time-barred. They
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1 are dismissed.

2 **OUTRAGE**

3 Mr. Martinez seeks damages under Washington law for the tort of
4 outrage, *i.e.*, intentional infliction of emotional distress. *Cf.*
5 *Kloepfel v. Bokor*, 149 Wn. 2d 192, 193 n.1, 66 P.3d 630 (2003) (the
6 words "'[o]utrage' and 'intentional infliction of emotional distress'
7 are synonyms for the same tort"). Mr. Martinez must prove three
8 elements in order to recover: "(1) extreme and outrageous conduct,
9 (2) intentional or reckless infliction of emotional distress, and (3)
10 actual result to plaintiff of severe emotional distress." *Id.* at 195.
11 He has not attempted to identify evidence in the record from which a
12 rational jury could find all of the elements listed above. For
13 example, while he alleges he suffered minor burns as a result of the
14 taser, he has offered no evidence he suffered severe emotional
15 distress. As a result, Deputy King is entitled to summary judgment on
16 Mr. Martinez's outrage claim.

17 **CONCLUSION**

18 The Court has dismissed all of the defendants save Deputy King,
19 and all of the claims against Deputy King save one. Thus, a single
20 issue remains for trial. It is whether Deputy King acted in an
21 objectively unreasonable manner in violation of the Fourth Amendment
22 by shooting Mr. Martinez with his taser on December 23, 2005.

23 **IT IS HEREBY ORDERED:**

24 1. The Court grants the defendants' motion to strike (Ct. Rec.
25 29) .
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